IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

Nos. 73-1234 and 73-1231

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
TRUCK DRIVERS UNION LOCAL NO. 413, AND TEXTILE WORKERS UNION,
Respondent.

LINDEN LUMBER DIVISION, SUMMER & CO.,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD
AND
TRUCK DRIVERS UNION LOCAL NO. 413, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Chamber of Commerce of the United States of America respectfully moves, pursuant to Rule 42 of the

Rules of this Court for leave to file the attached brief *amicus curiae* on behalf of the petitioners in these cases.

1. The Chamber is a federation consisting of a membership of over 3,700 state and local chambers of commerce and trade and professional associations, a direct business membership in excess of 38,000 and an underlying membership of approximately 5,000,000 business firms and individuals. It is the largest association of business and professional organizations in the United States.

2. The Chamber regularly represents the interests of its member-employers in important labor relations matters in this Court vitally affecting those interests. Such representation constitutes a significant aspect of the Chamber's functions. Accordingly, the Chamber has sought to advance those interests in a wide spectrum of labor relations litigation.*

3. The question presented in the instant cases — whether an employer, who has not interfered with the National Labor Relations Board's representation election process, may be required to bargain with a union asserting that it is the representative of a majority of the employer's employees where the union's majority status has not been established through the Board's election

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* E.g., *Corning Glass Works* v. *Brennan*, No. 73-29; *Geduldig* v. *Aiello*, No. 73-640; *William E. Arnold* v. *Carpenters*, No. 73-466; *Howard Johnson Company, Inc.* v. *Detroit Joint Executive Board, Hotel and Restaurant Employers and Bartenders International Union, AFL-CIO*, No. 73-631; *Gateway Coal Company* v. *United Mineworkers of America, et al.*, —— U.S. (No. 72-782, Jan. 1974); *Super Tire Engineering Company* v. *Lloyd W. McCorkle, et al.*, No. 72-1554; *Marco DeFunis* v. *Odegaard*, No. 73-235; *N.L.R.B.* v. *Bell Aerospace Company Division of Textron, Inc.* No. 72-1598; *Boys Markets* v. *Retail Clerks Union*, 398 U.S. 235 (1970); *N.L.R.B.* v. *The Boeing Company, et al.*, 93 S. Ct. 1952 (1973); *N.L.R.B.* v. *Granite State Joint Board*, 409 U.S. 213 (1972); *N.L.R.B.* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 517 (1971).

processes—is a matter of significant concern not only to the Chamber's membership but also for the administration of the National Labor Relations Act generally. The Board and the court below have reached far different conclusions with respect to the obligation of an employer who is confronted with a union demand for recognition. The resolution of the instant question is, therefore, one which will significantly determine the future direction of the representation process, and will touch and concern every employer subject to the jurisdiction of the Act.

4. The issue presented here is one which was left unanswered by this Court's *Gissel* decision. Since it is a question that can arise in every case where a union demands recognition, its potential for recurrence is immeasurable, and the consequent need for resolution manifest. Because of its broad representation of employers, the Chamber is in a position to present arguments to the Court which might not otherwise be advanced by the parties.

5. In addition to the importance of the issue raised herein for the Chamber's members generally, the Chamber specifically seeks permission to present its views as *amicus curiae* in these cases because, while the interests of Linden Lumber Division, Summer and Co., the employer in one case, are represented, the Employer in the other case, Wilder Mfg. and Co., did not participate in the court of appeals and its particular interests are unrepresented before this Court. Thus, even though the Chamber seeks to file the attached *amicus* brief subsequent to the filing of the petitions by the Board and Linden Lumber, which the Chamber supports, the Chamber as a representative of the interest of employers believes its participation to be warranted.

WHEREFORE, for the foregoing reasons, the Chamber of Commerce of the United States respectfully requests

that this Motion for Leave to File an Amicus brief be granted.

Respectfully submitted,

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE

INTEREST OF THE AMICUS

The interest of the Chamber is set forth in the foregoing "Motion For Leave To File Brief Amicus Curiae".

REASONS FOR GRANTING THE WRIT

I.

THE INSTANT CASES RAISE A SIGNIFICANT UNANSWERED QUESTION INVOLVING THE FUTURE DIRECTION TO BE TAKEN IN THE ADMINISTRATION OF THE NATIONAL LABOR RELATIONS ACT

In *National Labor Relations Board* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), this Court expressly left unanswered the question whether a bargaining order based on asserted evidence of union majority status other than certification as a result of a National Labor Relations Board election "is ever appropriate in cases where there is no interference with the election processes." *Id.*, at 595, 601, n. 18.[1] The instant cases raise the important unanswered question.

While both cases herein raise the same general issue, the asserted evidence of majority support which led to the filing of unfair labor practice charges against the respective employers was different. In *Linden Lumber* (No. 73-1231) the Union's claim of purported majority status was based on union authorization cards. In *Wilder* (No. 73-1234) when the Employer's representative, upon whom demand for recognition was made, was unable to respond to the Union without consulting an absent com-

[1] In *Gissel* the Court found that a bargaining order would be appropriate where an employer, confronted with a union claim for recognition based solely on union authorization cards, commits "serious unfair labor practices" that preclude the holding of a fair election, and that absent such unlawful conduct, the employer "can demand an election with a simple 'no comment' to the Union." *Id.*, at 594.

pany official, the Union established a picket line at the Employer's plant to evidence its alleged majority status. In both cases the unions chose to forego the Board's election processes, filed unfair labor practice charges and engaged in protracted strikes. In neither of the cases did the employers commit any independent unfair labor practices that would have precluded the holding of a fair Labor Board election. Nonetheless, the court below refused to hold that these employers, in merely declining to accede to the unions recognition demands, were within their statutory rights.

The problem of the extent to which extrinsic evidence of alleged majority status, in the form of authorization cards or a picket line, imposes a statutory duty upon employers in the absence of any unlawful conduct on their part is both significant and recurrent. As was recognized in *Gissel*, the imposition of a bargaining obligation on an employer where the union's representative status has not been determined by the results of a valid Board election invokes an uncertainty as to the union's claimed status that poses a problem of great significance to the Board in its administration of the Act. In the instant cases, the Board has attempted to remove the remaining vestige of uncertainty, left by *Gissel*, by giving full effect to this Court's view that the orderly election process is the "preferred route" [2] to resolution of union recognitional claims.

The standard established by the Board for resolving the question herein encourages unions seeking recognition to avail themselves of the statutory election process and thereby avoid the uncertainties and resultant litigation and industrial strife which that process is designed to avoid and which so often attend when unions seek to bypass that process. The Court below, on the other hand,

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[2] *Gissel, supra,* at 602.

has fashioned a rule which encourages union resort to the pre-*Gissel* quagmire of bargaining order recognition, and, in so doing, has seriously restructured the representation process by imposing an affirmative obligation upon employers to initiate that process if they are to avoid an ordered duty to bargain. The positions thus taken by the Board and the Court below with respect to the issue herein are diametrically opposed and pose divergent approaches to the future direction of the representation process under the Act. Guidance by this Court if necessary to resolve this problem.

Further, the need for resolution of this question is most pressing because of the recurrent nature of the problem. As a result of the approach taken by the Court below, it is a problem that, potentially, could arise in, or have effect on, each and every union demand for recognition.

Accordingly, the Chamber respectfully submits that this Court should grant the petitions submitted by the Board and by Linden Lumber Division, Summer & Co., herein, to resolve the issue presented in this matter and to provide the needed direction that only this Court can afford.

II.

THE DECISION BELOW ERRONEOUSLY AND IMPERMISSABLY RESTRUCTURES THE ACT'S REPRESENTATION PROCESS

The very basis of an employer's obligation to recognize and bargain with a union is the designation of the union as the representative by a majority of the employer's employees in a unit appropriate for collective bargaining purposes.[3] A union must establish its majority status in such unit. Clearly, the burden of such proof is on the union. The question involved herein, and one which has plagued

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[3] National Labor Relations Act, as amended, Section 9(a), 29 USC Sec. 159(a).

the Board for years, is simply how to determine this proof when a union seeks to establish its majority status and compel an employer to bargain when it has elected to bypass the Board election procedures and resort to "self-help".

For years, the Board applied what was known as the *Joy Silk* doctrine [4] to resolve this problem. Under that doctrine, an employer presented with asserted evidence of union majority status could not lawfully refuse to bargain with a union claiming recognition unless he had a "good faith doubt" as to the union's representative status. Evidence of an employer's lack of good faith doubt was established either by his commission of independent unfair labor practices or the employer's failure to justify his reasons for such doubt. Even under the *Joy Silk* doctrine, as it developed, the Board required the General Counsel, *not* the employers, to establish that an employer's refusal to recognize a union claiming recognition was motivated by bad faith.[5] Indeed the difficulty of establishing such subjective motivation led the Board to rely most consistently on the commission of unfair labor practices as evidence of bad faith.[6]

In *Gissel*, the Board acknowledged that under its practice, it had abandoned efforts to ascertain an employer's

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[4] *Joy Silk Mills, Inc.*, 85 NLRB 1263 (1949), *enf'd.* 185 F.2d 732 (CADC, 1950), *cert. denied*, 341 U.S. 914 (1951).

[5] *Aaron Bros. Co.*, 158 NLRB 1077 (1966); *Jem Mfg., Inc.*, 156 NLRB 643 (1966); *John P. Serpa, Inc.*, 155 NLRB 99 (1965), order set aside, *Retail Clerks Local 1179* v. *NLRB*, 376 F.2d 186 (CA 9, 1967).

[6] See, e.g., *Joy Silk Mills, Inc., supra; Benson Wholesale Co. Inc.*, 164 NLRB 536 (1967); *Taitel & Son*, 119 NLRB 910 (1957). Moreover, even prior to *Gissel*, unfair labor practices too insubstantial to warrant an inference of lack of good faith doubt in rejecting a union's recognition demand were held not to support bargaining orders. *Hammond & Irving, Inc.*, 157 NLRB 1071 (1965); *Hercules Packing Corp.*, 163 NLRB 264, *affirmed*, 386 F.2d 790 (CA 2, 1967).

subjective "good faith doubt" as unworkable, and this Court voiced approval of that practice. *Gissel, supra*, at 609. Similarly, in the instant cases, the Board rejected as unworkable the same subjective inquiry into an employer's asserted "independent knowledge" as a "return to the good faith doubt thicket." Thus, the Board has developed a clear rule to be administered in all cases—a rule which is consistent with the union's burden of proof and which avoids the evidentiary impossibility of determining an employer's subjective state of knowledge. Under the Board's current rule, an employer's subjective state of knowledge is irrelevant.

The decision of the court below, however, resurrects a doctrine of good faith and presumptions of good faith by which to measure the legality of an employer's conduct which this Court disapproved in *Gissel*. Thus, the Court below recognized the inherent evidentiary unreliability of such asserted manifestations of union majority support as were rejected by the Board:

> "Refusal to cross a picket line may reflect mere fear, See *NLRB* v. *Union Carbide Corp.*, 440 F.2d 54, 56 (4th Cir., 1971), *cert. denied*, 404 U.S. 826 (1971), or it reflects what the individual supposes is the will of the majority even though he (and in fact a majority) does not wish the union to act as a bargaining representative." *Truck Drivers Local 413* v. *NLRB*, —— F.2d ——, 84 LRRM 2177 (CADC, 1973) 2185, n. 44.

Nonetheless, the court determined to accord this concededly unreliable evidence a role in determining an employer's good faith and, hence, his statutory culpability. Accordingly, the court, contrary to the Board, viewed picket lines, as in *Wilder*, and union authorization cards, as in *Linden* as creating:

> "[A] sufficient probability of majority support as to require an employer asserting a doubt of majority

status to resolve the possibility through a petition for an election, if he is to avoid any duty to bargain and any inquiry into the actuality of his doubt." *Id.*, at 286.

The court thus interpreted Section 9(c)(1)(B) of the Act,[7] which provides for employer representation petitions, as compelling, under the penalty of Section 8(a)(5),[8] an affirmative obligation on the part of an employer to institute the representation process.

The court's interpretation is an erroneous construction of Congress' purpose which motivated the enactment of subsection 9(c)(1)(B). That legislative history indicates that that subsection was enacted to eliminate the unfairness that existed under the Act prior to the 1947 amendments, which permitted employers to file petitions only when confronted with claims to two or more unions seeking recognition; the requirement that an employer be presented with a claim for recognition prior to exercising his right to petition was inserted not,—as the court below reasons—to compel an employer to institute the representation process upon demand, but merely to prevent employers from petitioning "on the first day that a union organizer distributed leaflets at his plant", i.e., to prevent abuse of the representation process.[9]

Further, the lower Court's alternatives to an employer petition call upon the Board to re-establish the murky "good faith doubt" test that had become unworkable and that was laid to rest in *Gissel*.[10] Moreover, the decision

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[7] 29 USC Sec. 159(c)(1)(B).

[8] 29 USC Sec. 158(a)(5).

[9] H.R. Rep. No. 245, 80th Cong. 1st Sess., 35 (1947); I Legislative History of the Labor Management Relations Act, (I Leg. Hist. p. 326); S. Rep. No. 105, 80th Cong. 1st Sess. 10-11 (1947), I Leg. Hist. pp. 416-417.

[10] The Court's suggestion would create the anomolous situation where an employer who committed no unfair labor practices but

below, by placing the burden of instituting the representation process on employers, restructures and alters the nature of that entire process. As set forth above, the burden of proving its entitlement to representative status in an appropriate unit is on the union. It always remains on the union. If an employer were required, as a matter of Board policy, to institute representation proceedings every time a union claimed recognition, the union would be relieved of its burden of establishing a sufficient showing of interest to gain an election.[11] Additionally, as the Court below found, the employer would be required to designate the bargaining unit and "therefore would not be entitled, as an objecting party, to request a [representation] hearing."[12] The effect of this would permit the union to escape inquiry into the appropriateness of the unit, or inclusions or exclusions of categories of employees within that unit, that the union might have sought had it filed a petition.

Aside from this impermissable shifting of burdens from the unions seeking representation, to employers, the rule suggested by the Court of Appeals below leads to tactical misuse and fosters industrial disruption contrary to the nature and the purpose of the representation process. Certainly, as indicated by the legislative history of Section 9(c)(1)(B), the representation process is not a tool or lever which an employer can use to gain unfair

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who, because he is faced with a picket line, is deemed to have subjective "knowledge" of union majority status, would be required to bargain, while another employer, who, under *Gissel*, had committed insubstantial unfair labor practices having no impact on the election process, would not be compelled to bargain.

[11] A union petition filed under Section 9(c)(1)(A) requires that the petition be supported by 30% of the employees in the unit. An employer petition filed under Section 9(c)(1)(B) requires no such interest showing. National Labor Relations Board Statements of Procedure, 29 CFR Sec. 101.18(a).

[12] 84 LRRM at 2186.

advantage in order to defeat a union campaign. Equally, that process is not designed to afford unions similar tactical maneuverability. However, the decision of the Court below permits unions to use the Board's procedures for such purpose.

A union, by demanding recognition, could at its option force an employer either to recognize it or file an employer petition even if the union does not have majority support. By setting up a picket line with a few loyalists, which is honored out of fear or respect, a union could force an employer either to recognize it, even though the majority of employees did not desire to be represented by that union, or to file a representation petition which the union would be unable validly to file.

There are further tactical misuses inherent in the rule articulated by the court below. For example, the unions argued below that an employer who files a petition without actual doubt as to the union's majority status violates Section 8(a)(5) as much as he does when, for example, faced with a picket line, he refuses to recognize the union. The lower court felt that it need not determine this question. 84 LRRM at 7186. Consideration of this union contention, however, necessarily reflects the untenable position in which that court's decision places employers. If a union which actually does possess majority support in a given unit were to demand recognition, and the employer, pursuant to the court's rule, files a petition asserting a different unit to be appropriate, or raising other unit issues,—the resolution of which would be undesirable to the union, the union could then take the position that the employer did not actually doubt the union's majority status with respect to unit selection; that the employer's petition was merely dilatory; and that the employer thereby violated Section 8(a)(5).[13] In this

[13] In an unfair labor practice proceeding, the union could prevail in its unit assertion since the Act speaks of "*a* union appropriate"

way, a union could circumvent the election procedure and still obtain a bargaining order. Equally, under the court's suggested rule, a bargaining order would lie where an employer does not file a petition but initially rejects the union's demand. The employer is thus faced with a Hobson's choice, placed in that position by a rule which permits such manipulation of the Board's processes.

Contrary to the view of the court below, the desired expedition and avoidance of protracted litigation would not result if the Board were required to implement the decision below.[14] Certainly, restructuring the Board's representation process in a manner that dispenses with prerequisites for certification and that makes that process a lever for manipulation is destructive of that process, and is too high a price to pay for the questionable returns that might result.

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for bargaining purposes. In a given situation, there may be more than one unit appropriate for bargaining purposes. Since, under the Board's "blocking" practice a Section 8(a)(5) charge, which presupposes majority representation, "blocks" the processing of a representation petition until the unfair labor practice case is disposed of, a union could obtain favorable unit determination and a bargaining order through its 8(a)(5) proceeding against the employer despite the filing of a petition by the employer in which he seeks a different appropriate unit.

[14] The instant cases which have been in litigation for a number of years and which involved industrial disruption of many months, are a prime example of the reasons for encouraging the Board in its attempt to avoid such results.

CONCLUSION

For the foregoing reasons, and those urged by the National Labor Relations Board and Linden Lumber Division, Summer & Co., the Chamber respectfully prays that their respective petitions for Writ of Certiorari be granted.

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